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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES; and EDWARD D. LONGLEY, as Director of the Bureau of Street Maintenance,

Appellants,

VS.

TAXPAYERS FOR VINCENT, an unincorporated political association; and CANDIDATES' OUTDOOR GRAPHIC SERVICE (COGS), a California Corporation,

Appellees.

On Appeal From The U.S. Court of Appeals For the Ninth Circuit

BRIEF OF AMICUS CURIAE CITY OF ANTIOCH IN SUPPORT OF APPELLANT CITY OF LOS ANGELES

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April, 1983

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TABLE OF CONTENTS

	Page
Interest of amicus curiae	1
Argument	2
A. Constitutional analysis in the First Amendment area follows a balancing approach	2
B. Legitimate governmental interests justify the public property posting ban	3
C. The Los Angeles ordinance meets the test of validity as established by this Court	8
Conclusion	9
Cities joining as amici curiae	A-1

TABLE OF AUTHORITIES CITED

Cases

Page

Baldwin v. Redwood City (1976) 540 F.2d 1360 .....7, 9, 10

Consolidated Edison Co. of New York, Inc. v. Public Services Com. of New York (1980) 447 U.S. 530 8

Cox v. Louisiana (1965) 379 U.S. 536 2

Desert Outdoor Advertising, Inc. v. County of San Bernardino (1964) 225 Cal.App.2d 765, app. dismd. 398 U.S. 8 7

FCC v. National Citizens Comm. for Broadcasting (1978) 436 U.S. 775 2

Frumer v. Cheltenham Tp. (1982) 545 F.Supp. 1292 6

Lehman v. City of Shaker Heights (1974) 418 U.S. 298 4

Metromedia, Inc. v. San Diego (1981) 453 U.S. 490.....
.....2, 3, 6, 7, 10

Perry Ed. Assn. v. Perry Local Ed. Assn. (1983) .....
U.S. ....., 74 L.Ed.2d 794 ..... 2, 3

Suffolk Outdoor Advertising Co. v. Hulse (1977) 373 N.E.2d 263, app. dismd. ..... U.S. ....., 58 L.Ed.2d 101, 99 S.Ct. 66 7

Sussli v. City of San Mateo (1981) 120 Cal.App.3d 1, cert. denied 454 U.S. 1085 .....3, 4, 8, 9

Thomas v. Marietta (1980) 265 S.E.2d 775, cert. denied ..... U.S. ....., 66 L.Ed.2d 45 7

Verrilli v. City of Concord (1977) 548 F.2d 262 .....9, 10

Veterans of Foreign Wars, Post 4263 v. Steamboat Springs (1978) 575 P.2d 835, app. dismd. ..... U.S. ....., 58 L.Ed.2d 101 6

Constitution

United States Constitution, First Amendment 2, 8

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The City of Antioch, a political subdivision of the State of California, files this *amicus curiae* brief on the merits pursuant to Rule 42(4) in support of appellant City of Los Angeles.

INTEREST OF AMICUS CURIAE

Antioch has an ordinance relating to temporary signs which is virtually identical to the Los Angeles provision

struck down by the Ninth Circuit opinion. Antioch is also concerned that the sweeping language and holding of that opinion may signal the emasculation of other regulations dealing with temporary posters. Because of the magnitude of the problems created by the Ninth Circuit opinion, the Board of Directors of the League of California Cities has authorized its member municipalities to add their names to this brief as *amici*. The universal nature of concern regarding this issue is reflected by the list of cities appended to this brief, which includes communities of all sizes and amenities. Temporary signs pose problems for rural and suburban areas, as well as for a metropolis like Los Angeles.

ARGUMENT

A. Constitutional analysis in the First Amendment area follows a balancing approach

Regulation of speech and speech-related action deserves the closest scrutiny, as such regulations affect our most cherished freedoms protected by the First Amendment. However, those values are not absolute, and must at times, yield to other societal interests.[1] This Court has "emphatically rejected" the notion that the Constitution affords the same freedom to those who communicate by conduct as compared to those who communicate ideas by speech or publication.[2] As an example, there is no unabridgable First Amendment right to broadcast via the public airwaves, *FCC v. National Citizens Comm. for Broadcasting* (1978) 436 U.S. 775, or guaranteed access to property simply because it is owned by the government, *Perry Ed.*

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[1]Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, 501.

[2]Cox v. Louisiana (1965) 379 U.S. 536.

Assn. v. Perry Local Ed. Assn. (1983) ..... U.S. ....., 74 L.Ed.2d 794, 805.

The plurality opinion in *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490 recognized that "each method of communicating ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."[3] This case presents the opportunity to examine the modern phenomenon of the temporary poster, and the unique impacts which such signs create.

Temporary signs which advertise political campaigns create many problems for cities. Typically, they are posted in great numbers, in garish colors, throughout the community, often many months prior to the election. They multiply at street corners and intersections, blaring propaganda at the motorist and passerby. Unfortunately, the election is not necessarily a signal for their removal, and all too frequently they remain posted, fading and torn, a visual blight upon the community. These problems are very similar to those created by temporary commercial signs and hand bills, which may advertise a wide variety of events, such as rock concerts, garage sales and "swap meets."

B. Legitimate governmental interests justify the public property posting ban

In the single appellate state court opinion which comprehensively addresses this issue, *Sussli v. City of San Mateo* (1981) 120 Cal.App.3d 1, *cert. denied* 454 U.S. 1085 (1981), a number of legitimate governmental interests

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[3]Metromedia v. San Diego, 453 U.S. 490, 501.

were identified to justify a prohibition against posting temporary signs in public property. They include:

1. Prevention of damage to public property;

2. Preservation of public confidence in the neutrality of elections;

3. Protection of the public from the blare of political propaganda;

4. Avoidance of administrative burdens associated with the need to monitor the placement of signs and their eventual removal;

5. Preservation of the prominence of public signs and lines of sight in the interest of public safety; and

6. Aesthetic considerations.[4]

This Court has held that a public transit system is not required to allow election signs on its buses, even though commercial advertising was permitted, *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298. The Court said (p. 304):

> "Were we to hold to the contrary display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require. . . . Users (of the transit system) would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. . . . The city consciously limited access to its transit system adver-

[4]Sussli v. San Mateo, 120 Cal.App.3d at 4, n. 5.

> tising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience."

Justice Douglas, concurring, held that the commuting public, like the driving public, was a captive audience before whom the candidate had no constitutional right to spread his message. He said (pp. 306, 308):

> "Bus and streetcar placards are in the category of highway billboards which have long been used to display an array of commercial and political messages. But this particular form of communication has been significantly curtailed by state regulation adopted pursuant to the Highway Beautification Act of 1965, 23 U.S.C. § 131, which conditions certain federal highway funds upon strict regulation of highway advertising. Ohio is among the States which have sought to protect the interests of their motorists by enacting regulations pursuant to the Act. . . ."

The Ninth Circuit opinion in this case implies that while not *all* public property must be available for sign posting, certain limited types of public property should be opened up for that purpose. This policy would compound the problem of governmental officials who would have to parcel out the limited space available to candidates, arbitrate disputes about traffic safety, and insure cleanup after the election. The opportunity for favoritism is very real in this situation, which calls into question the neutrality of the officials responsible for conducting the election.

This Court has recognized the traffic safety threat of billboards: "We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and

substantial hazards to traffic safety." (*Metromedia, supra,* p. 509).

The District Court, in *Frumer v. Cheltenham* Tp. (1982) 545 F.Supp. 1292, discussed the unique hazard created by temporary signs, which unlike the billboards in *Metromedia,* are actually placed *in* the street environment:

> "It cannot be disputed that signs are distracting. Their whole purpose is to call attention to themselves and to the extent that they are successful, a motorist's powers of observation are diverted from those things which he may injure or which may bring injury to him. A sign that is large enough to be seen at one glance may also be large enough to conceal a hazard. A small sign may get more than a glance just because it needs more attention to be understood. Usually, temporary signs rely on the impact of multiple exposures to convey their message, proliferating without seeming limit in the process. To suggest that one may simply turn away from the impact of temporary signs is to suggest that one may do that which the sign-placer has resolved one shall not do. Neither pedestrians nor drivers can turn away if there are three-four signs on every pole on both sides of the street. To argue that one need not look is to contend one should walk or drive carelessly. Furthermore, it cannot be disputed that temporary signs posted on traffic signs which either direct attention from them, or worse, conceal them, are hazardous to both drivers and pedestrians." (*Frumer, supra,* 545 F.Supp. 1292, 1295.)

Sign codes adopted to promote traffic safety and the appearance of the community have been upheld as legitimate exercises of the police power, *Veterans of Foreign Wars, Post 4264 v. Steamboat Springs* (1978) 575 P.2d 835, *app. dismd.* ..... U.S. ....., 58 L.Ed.2d 101.

Temporary signs posted helter-skelter throughout the community not only threaten traffic safety, they are eyesores. This Court's *Metromedia* plurality opinion recognizes that regulation, to protect aesthetic values, is legitimate if done reasonably and not as a "public rationalization of an impermissible purpose."[5] That opinion noted that billboards are perceived as an "esthetic harm". Temporary signs multiply this harm greatly by the repetitiveness of their posting. Their temporary nature, and the lack of attention to their removal, leads to deterioration of the sign, which is generally untrue of billboards. Additionally, temporary political signs are allowed in zoning districts (such as residential areas) where a permanent billboard would not be permitted by such zoning regulations, *Baldwin v. Redwood City* (1976) 540 F.2d 1360. A municipality may regulate temporary signs where permanent signs are considered more conducive to the public safety and welfare, *Thomas v. Marietta* (1980) 265 S.E.2d 775, *cert. denied* ..... U.S. ....., 66 L.Ed.2d 45.

Recent cases have upheld sign regulations on the basis of aesthetic concerns alone: *Desert Outdoor Advertising, Inc. v. County of San Bernardino* (ordinances banning billboards near freeway) 225 Cal.App.2d 765, *app. dismd.* 398 U.S. 8; *Suffolk Outdoor Advertising Co. v. Hulse* (1977) 373 N.E.2d 263, *app. dismd.* ..... U.S. ....., 58 L.Ed.2d 101.

The *Sussli* court, in weighing the competing interests, attached "special significance to the compelling interest of the public in maintaining some semblance of visual harmony in the areas where they live. Thousands of derelict signs from past elections testify to the difficulty of pro-

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[5]Metromedia at p. 510.

tecting public property from unsightly signs even where laws forbid public posting. Without such laws, one foresees an absolute end to the already eroded aesthetic integrity of public places in a tidal wave of publicly sponsored graffiti."[6]

C. The Los Angeles ordinance meets the test of validity as established by this Court

In *Consolidated Edison Co. of New York, Inc. v. Public Services Com. of New York* (1980) 447 U.S. 530, this Court announced a three-prong test for validity of regulations dealing with the First Amendment. The regulation must be content-neutral, serve a significant governmental interest, and there must be available some alternative channel of communication.

The Los Angeles ordinance meets all three tests. The regulation applies to all types of temporary signs, commercial as well as noncommercial.[7] It serves the numerous significant governmental interests which were discussed above. Finally, there are ample other opportunities for communication.

As to alternate channels of communication, there exists in the community the very substantial forum of private property which is available for the posting of temporary signs. Also, of course, there is the media.

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[6]Sussli, 120 Cal.App.3d 1, 10.

[7]This brief emphasizes discussion of temporary *political* signs because the case arose in that context and because of the sensitive First Amendment issues involved. However, it is clear that Los Angeles enforced the ban against *all* temporary signs, commercial as well as political. See Jurisdictional Statement, App. 17a, paragraph 9.

Public property and the public streets themselves also offer channels of communication under the Los Angeles ordinance. For example, on the public streets and sidewalks, candidates and their workers may distribute leaflets and literature. They may speak. They may affix "bumper stickers" to vehicles which travel upon or which are parked upon the streets. Temporary signs may be affixed to vehicles travelling or parked upon the highways. Depending upon the policy of the relevant agencies, political advertising may be authorized upon transit vehicles or public benches. Messages may be placed on permanent billboards authorized by the zoning code.

There are "innumerable modes of political expression in both private and public forums . . . to say that this is insufficient merely because it is incomplete, and that every man has at all times an unabridgeable right to use every possible means of expression irrespective of any legitimate countervailing public interest, seems to us erroneous." (*Sussli, supra*, 120 Cal.App.3d 1, 11.)

CONCLUSION

The problems created by temporary signs are very real problems for the cities joining in this brief. The Los Angeles ordinance appears to be the most appropriate way to address these concerns. Previous opinions from the Ninth Circuit have already eroded the police powers of cities in this field. The *Baldwin* case, *supra*, held that cities cannot regulate the size or number of political signs placed upon private property. *Verrilli v. City of Concord* (1977) 548 F.2d 262, holds that cities may not require cash deposits to insure the cleanup of such signs after the election or event which they advertise.

Of particular concern to the cities is not only the holding of the Ninth Circuit below in this case, but the sweeping language used in the opinion. If allowed to stand, it appears that it would be extremely difficult, if not impossible, to craft any type of regulation to effectively deal with the problems outlined herein.

For example, *Taxpayers* suggests that a city must demonstrate that its regulations are the *least restrictive* means available for achieving its purposes. In prior cases dealing with this topic, the test has always been whether the chosen limitations are unduly restrictive, *Baldwin* and *Verrilli, supra.* To impose a "least restrictive" requirement is to grant no allowance for municipal preference and to create an unreasonably difficult standard.

The *Taxpayers* opinion also suggests that a city must prove its "substantial" (*i.e.* sincere) interest in aesthetics by being engaged in a "comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment," 682 F.2d at 852, quoting *Metromedia, supra,* at p. 531.

In practice, the zoning codes of most cities constitute that effort to address aesthetic concerns, and the requirements for design control, landscaping, setbacks, architectural approval, *etc.* are typically more stringent than the controls placed on temporary signs. Regulations on temporary signs should be viewed from the opposite perspective—if the regulations are liberalized, what effect will this have on the other regulations already in effect which attempt to enhance the environment?

The opinion below should be reversed, and the Los Angeles ordinance should be found to be constitutional.

DATED: April, 1983

Respectfully submitted,

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CALIFORNIA CITIES JOINING AS AMICI CURIAE

Adelanto
Alameda
Berkeley
Burlingame
Chico
Concord
Danville
Fairfield
Grand Terrace
Hawthorne
Hayward
Indian Wells
Lafayette
Los Altos
McFarland
Modesto
Moraga
Morgan Hill
Oakdale
Palm Springs
Palo Alto
Placentia
Pleasant Hill
Pomona
San Buenaventura
San Diego
San Mateo
San Rafael
Santa Clara
Simi Valley
South Lake Tahoe
South San Francisco
Sunnyvale
Tehachapi
Thousand Oaks
Torrance
Vallejo
Vista
Walnut Creek